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The Establishment of Boundary Lines by Practical Location

THE establishment of definite rules for the determination of the true boundary line between coterminous parcels of real estate is a matter of growing interest and importance in the western states, where the rapid increase of population is converting fields into subdivisions, causing a corresponding change in land values, and substituting feet and inches as units of land measurement instead of acres. The inaccuracy of early surveys, the fine disregard which our pioneers showed for the accurate measurement of their holdings, and the difficulties inherent in the subject, all result in boundary line disputes, which become more frequent as the subject matter becomes more valuable.

A striking example of the difficulties which result from inaccurate maps is found in the map of Ord's survey, "the original and official survey of the city of Los Angeles." The map includes many squares of land in the retail business district, the most congested part of the city. Almost every description used in conveying property within that district refers to and is dependent for location upon Ord's map. Yet in litigation between the city and individual property owners relating to the width of a certain street, and the position of its lines, it was found that no monument of the survey had survived, that there was no man living who had assisted in making the survey and who could testify as to the location of any line or point in the map; in short that the map does not "locate itself on the ground" and cannot be located. The Supreme Court in deciding the case, declared that the inaccuracy of early surveys was a matter of which the courts have judicial knowledge.[1]

For these and many other reasons the true boundary lines, as called for by deeds or other instruments, frequently cannot be

[1] Hellman v. City of Los Angeles (1899), 125 Cal. 383, 58 Pac. 10.

located definitely and certainly. A conflict then arises between the true line and the line actually established by occupation and the erection of buildings, fences, and other structures.

It is not the purpose of this article to discuss all of the principles relating to disputed boundaries. Our inquiry is restricted to the rules which are applicable when the division line of contiguous lands as indicated by practical location does not correspond with the true boundary, as determined accurately by a survey based upon the calls of deeds, and when there is no express agreement in writing adopting one or the other as the line.

When there is a proper written agreement for the correction or establishment of boundaries there can be little room for discussion of its effect; therefore, we may confine our attention to a consideration of parol agreements and the establishment of lines by estoppel or by adverse possession.

Ordinarily descriptions contained in title deeds will fix boundaries. The exceptional state exists when instruments of such dignity are disregarded, and the haphazard location of hedges, fences, ditches, and other physical objects are taken as the standard in their place.

When the practical location does prevail, the case will fall within one of the following classes: (1) Lines established by agreement, express or tacit; (2) Lines established by estoppel; (3) Lines established through the acquisition of title by adverse possession.

I. Lines Established by Agreement.

As the result of a gradual evolution, traceable in the opinions of our Supreme Court, this rule has been developed: When the owners of adjoining estates, being uncertain of the true position of their boundary as described in their respective deeds, agree upon its true location, such line becomes, in law, the true line called for by the descriptions of their respective deeds, regardless of the accuracy of the agreed location as it may appear by subsequent measurements. The line thus defined will attach itself to and define the deeds, and to that extent prevails over the written instruments, notwithstanding the statute of frauds.

In Lewis v. Ogram[2] the court said:

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[2] (1906), 149 Cal. 505, 87 Pac. 60; see Young v. Blakeman (1908), 153 Cal. 477, 481, 95 Pac. 888; 4 Am. & Eng. Encyc. Law, 860; Dierssen v. Nelson (1903), 138 Cal. 394, 71 Pac. 456.

"Such an agreement, necessarily, is not valid for any other purpose than that of settling an uncertainty in regard to the common boundary. If adjoining owners agree on a division line, knowing that it is not the true line, and with the purpose of thereby transferring from one of them to the other a body of land which they know his true line does not embrace, the agreement will not be enforced. Such a transaction would not constitute an adjustment of uncertainties or doubts as to the line, but would be an attempt to convey or release land from one to the other. Land cannot be conveyed by the device of moving fences or changing the marks or monuments which define its limits. If an agreement having for its real object the transfer of the land, but relating by its terms solely to the boundary line and made with knowledge that the true line is elsewhere than at the place fixed, is oral, it would be void, being an attempt to transfer land without writing. If it is in writing it would be ineffectual to pass title, for it would lack the apt words of conveyance that are necessary to accomplish a transfer of real property."

It is explained in Nathan v. Dierssen,[3] Lewis v. Ogram,[4] Mann v. Mann,[5] and Clapp v. Churchill,[6] that these agreements, when valid, do not operate upon title. The theory of the law is that the agreed boundary line attaches itself to and becomes a part of the deeds; that the owners, after their boundary is fixed by consent, hold up to it by virtue of their title deeds and not by virtue of a parol transfer. Almost without exception those instances found in the California reports in which boundary lines by agreement, express or tacit, prevailed over true boundary lines, are in accord with the foregoing statement that the element of uncertainty is vital to their validity. It is true, as well, that whenever uncertainty was not present, as in Nathan v. Dierssen, Lewis v. Ogram, and Mann v. Mann, practical location had to give way to the superior dignity of the calls of written instruments.

Nathan v. Dierssen[7] related to a tract of land on the west side of the Sacramento River. After the death of the owner of the tract, his widow and his son executed to each other partition deeds of the property, assigning to the widow the northern part of the tract and to the son the southern part, each described by metes and bounds. Distribution was ordered in accordance with these deeds, after

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[3] (1903), 134 Cal. 282, 66 Pac. 485.
[4] (1906), 149 Cal. 505, 508, 87 Pac. 60.
[5] (1907), 152 Cal. 23, 27, 91 Pac. 994.
[6] (1913), 164 Cal. 741, 130 Pac. 106.
[7] (1903), 134 Cal. 282, 284, 66 Pac. 485.

which the widow and son had a survey made of their division line, but deliberately disregarded the true line, and had the surveyor set the stakes along a line satisfactory to themselves. Subsequently other persons became interested in the two tracts, until finally the litigation arose between Nathan and Dierssen. Dierssen relied upon the establishment of a boundary line by parol. The court reversed a judgment in his favor, saying:

> "This, however, is not such a case, but an attempt to convey by parol, and without consideration, a strip of land belonging to one of the tracts abutting upon a well recognized boundary line. This is squarely in the teeth of the statute of frauds."

There would seem to be no difference in principle between express and tacit parol agreements fixing boundaries. The evidence in a given case being sufficient to show either one or the other type of contract, the same rules will apply with respect to such questions as its validity, and its control over descriptions contained in deeds. This being true, cases of both kinds may be examined together chronologically, in order to trace the process by which doubt or uncertainty has come to be regarded as prerequisite to a valid parol boundary agreement.

The first imperfect statement of the rule was made, as far as California decisions are concerned, in Sneed v. Osborn.[8] The case was not presented to the trial court as involving a boundary established by acquiescence, and counsel did not particularly urge that phase in the Supreme Court. The latter tribunal, nevertheless, saying that the point was of too much importance to be passed over without notice, declared that

> "When the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line."

In this form the rule is too broad. It is not limited to cases of uncertainty and would apply as well to a deliberate attempt, as in Nathan v. Dierssen,[9] to change a definitely known boundary. In its application to the facts of that case it was correct, however, as a brief statement will show.

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[8] (1864), 25 Cal. 619, 626, 30 Pac. 433. See also Sneed v. Woodward (1866), 30 Cal. 430.

[9] Supra, n. 3.

Salvador Vallejo conveyed a certain square mile of land to one Boggs, and later conveyed another square mile to Harrison, the Harrison parcel being described as bounded on the north by the tract sold to Boggs. Of the Boggs deed the court said: "Probably no two men would take the deed, and going on the land separately, fix upon the same place for the initial point."

Necessarily the southerly line of Boggs' land, being the northerly line of Harrison's, was uncertain, and the same uncertainty was carried into the deeds which vested in Sneed and Osborn their title to subdivisions of the Harrison property. The court correctly says that from acquiescence in a division line an agreement is presumed, and not a grant,

> "for the one party does not purport or attempt to sell or convey to the other any land; nor does the other set up any right under a purchase or conveyance of the legal or equitable title, made at the establishment of the division line. The division line when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed, in accordance with the understanding of the parties, who are presumed to know best their lands."

Hastings v. Stark[10] should be noted because of an interesting distinction to which it points. There the western line called for by plaintiff's deed ran "along the base of the mountains." One witness called a certain elevation a mountain; another called it a hill, and said that the mountain was reached after passing over the hill and across a valley. The latter view was consistent with the practical location which had been made, and was adopted by the jury. Thus it appeared that the parties, by running and marking the line upon the land, had identified a call which was uncertain from the language of the deed. The uncertainty was such that either one of two objects answered the call, so that the line might run to either and still harmonize with the other calls of the deed. The parties might adopt either line, and be bound thereby. Acquiescence would add nothing to the conclusiveness of the location of the line.

When the evidence shows, as in Irvine v. Adler,[11] that the fence has been erected with the understanding that it is not on the true line, and that it should be moved whenever the true line is ascertained,

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[10] (1868), 36 Cal. 122.
[11] (1872), 44 Cal. 559.

the existence of an agreement to adopt the fence as a boundary line is negatived.[12]

Columbet v. Pacheco[13] involved a division fence that had stood without controversy as to its location from 1818 to 1866. Defendant had lost her deeds, and it is fair to say that this created an uncertainty as to her true boundary. The practical location was sustained on the authority of Sneed v. Osborn.[14] The opinion of the court is subject to the same criticism as that in the Sneed case—it does not limit the operation of the rule to cases of uncertainty.

These defective statements bore fruit in the decision of Biggins v. Champlin,[15] in which the court had before it a division fence erected and allowed to stand for about eighteen years upon a line fixed by express parol agreement. There was no doubt as to the accuracy of the calls of the deed. Counsel for appellant clearly called the attention of the Supreme Court to the proposition that this was not a case of an uncertain or ambiguous boundary; that "when the lines and boundaries are fixed and can be identified a verbal agreement to fix the lines and boundaries differently is within the statute of frauds, and void." The court made no reference to this contention in its opinion, and without discussion, basing its decision on the authority of Columbet v. Pacheco and Sneed v. Osborn, sustained the agreement, as against the true dividing line. The case will be mentioned again when we discuss the effect of mistake upon boundary agreements. Both as it relates to boundary agreements and in its bearing upon the question of mistake, it seems to be out of harmony with the later decisions, and with the law as we conceive it to be.

Cooper v. Vierra,[16] was decided in the same month as Biggins v. Champlin, and by the same department. Justice McKee, who wrote the Cooper opinion, now introduces a new phrase into his statement of the law, presaging the rules as crystallized in Young v. Blakeman[17] and other late cases. He says:

> "When coterminous proprietors of land, *in good faith,* agree upon and fix and establish a boundary the line thus fixed cannot be questioned."

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[12] See also, Peters v. Gracia (1895), 110 Cal. 89, 94, 42 Pac. 464.
[13] (1874), 48 Cal. 395.
[14] Supra, n. 8.
[15] (1881), 59 Cal. 113.
[16] (1881), 59 Cal. 282.
[17] (1908), 153 Cal. 477, 95 Pac. 888.

The good faith required can only be an honest uncertainty as to the true line; the rule is slowly evolving. In this case, at a time when plaintiff and defendant's grantors owned adjoining lands separated by a fence, they became dissatisfied, believing that the fence did not conform to the true line. By mutual consent the fence was removed and reconstructed upon a new and agreed line. Evidently there was an uncertainty and an express parol agreement fixing the line. Defendant then acquired title by a deed describing the tract as bounded on one side by the fence line. For eight years he continued in the use of the land, up to the fence, until the action was commenced, and for the last five of the eight years he remained in such possession in the face of plaintiff's asserted claim. The decision seems to be justifiable because of the express agreement, and also under ordinary principles of adverse possession.

Cases such as Johnson v. Brown[18] demonstrate the necessity for a definition of "uncertainty" in connection with boundary agreements. Johnson had owned a tract one hundred feet wide, and had sold to Brown a lot twenty-five feet wide off its southern side, pointing out to Brown, at the time of the sale, a fence as the southern line of the tract. Thereupon Brown, with a pole and tape line, measured northerly to a point which he supposed was twenty-five feet northerly from the fence, but which later proved to be twenty-six feet distant. The measurement thus included the strip of land in controversy, but this was not known to Johnson or to Brown. Acquiescence in the division line thus established continued almost eight years, when the action was commenced. In a certain loose sense, these facts showed an uncertainty as to the true position of the line. A stricter construction would be preferable; such rough measurements should not be permitted to confuse titles. The case was decided primarily because Brown's title had ripened by prescription. A single sentence relating to boundaries by acquiescence is thrown in by the court almost as an afterthought.

In Truett v. Adams[19] the court says:

> "Undoubtedly where the location of premises intended to be conveyed can be ascertained from the terms used in the instrument of conveyance, neither the acts nor declarations of

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[18] (1883), 63 Cal. 391.

[19] (1884), 66 Cal. 218, *222*, 5 Pac. 96.

> the parties are admissible to show their understanding of the description contained in the conveyance."

The case involved rather the construction of an exception in a deed than a claim of an agreed boundary, the acts of the parties confirming the construction placed upon the instrument by the court. However, a single sentence indicates that Justice McKee, also the author of this opinion, based his decision in part upon the establishment of a boundary by possession and use, for he said:

> "And where it is proved that a line has been agreed upon, either expressly or by long acquiescence, as the dividing line between two tracts of land, courts will not disturb the line."

Standing alone, and without qualification, this sentence might contradict the first quotation which we have made from the same opinion. Sneed v. Osborn, with its too broad version of the rule, and a single New York case[20] are cited as authorities for the proposition, to which no other or further reference is made in the opinion.

Our criticism goes only to the form in which the law is stated in Truett v. Adams, as the case was distinctly one in which acquiescence in a line should control. "The idiomatic forms of expression" used in the deeds left the exact intention of the grantor clouded in serious doubt.

The plaintiff in Quinn v. Windmiller[21] sought to quiet his title to a disputed strip of land, bounded on defendant's side by a fence. Defendant's testimony, accepted by the court, was that he and one Tapper, the predecessor in interest of plaintiff, did not know where the lines were, and hunted for them. Tapper claimed to the line upon which the fence, pursuant to this conversation, was built, and it was agreed that the fence would be moved to the true line whenever it should be ascertained. Such a situation is lacking in all the elements of contract, express or tacit. The court rejected plaintiff's claim that the defendant was bound by his acquiescence in the line of the fence, even though the fence had stood for ten years, and distinguished earlier California cases in which there had been agreement. The decision illustrates the necessity of a contract, either express or tacit, to fix a line, in the absence of estoppel or the acquisition of title by adverse possession. Only by keeping this necessity in mind do we avoid the

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[20] McCormick v. Barnum (1833), 10 Wend. 104.
[21] (1885), 67 Cal. 461, 8 Pac. 14.

error of assuming that the owner of land is bound by a practical location upon the sole condition that the particular structure has stood for five years or more. If circumstances are such as to negative the existence of a contract, obviously none can be inferred; and the parties are thrown back to their boundaries under their deeds.

In the same year, Smith v. Robarts[22] was decided. The true divisional line was the line of a United States survey. In 1871 the grantors of the respective parties built a fence on a different line which they recognized as the line for several years thereafter. They were never satisfied that it was on the true line, subsequently found by measurement that it was not, and agreed to move the fence. The fence was not moved, though each later owner agreed that it would be. Here

> "acquiescence in the fence line as the true divisional line of the respective tracts of land was not considered by the grantors of the parties in the case as binding between them. Both agreed and recognized the fact that it was a mistake, and that any portion of the land of either tract which was held by the other was held under a mutual mistake."

The case emphasizes the contractual nature of boundaries by so-called acquiescence.

In White v. Spreckels,[23] Spreckels claimed a strip of land lying along the division line between the Calabasas and the Aptos ranchos, upon the theory that a fence was built along the strip in 1875, with the understanding that it should constitute the boundary, and that defendant as of right had retained possession up to the fence from that date. In disallowing this claim, the court said:

> "Paterson (from whom plaintiff deraigned title by mesne conveyances) seems to have been quite willing that Spreckels should place the fence where he chose, without reference to the true boundary, and his conduct is wanting in the essential element of an intent and willingness to establish a certain and definite line between his property and that of defendant."

No reference was made, either in the brief of counsel or in the decision itself, to Quinn v. Windmiller.[24] In each case the court attacked the problem as one of first impression, and reached the same solution.

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[22] (1885), 2 Cal. Unrep. Cas. 604, 9 Pac. 104.
[23] (1888), 75 Cal. 610, 17 Pac. 715.
[24] Supra, n. 21.

The facts in Hughes v. Wheeler[25] are not clearly stated in the report, but the transcript shows that the true section line, which was the boundary line in dispute, had been established and marked by the United States surveyor; that the plaintiff claimed that a different line had become established by agreement and acquiescence; and that there was no doubt or uncertainty as to the true line. The Supreme Court held that "no agreement or acquiescence between the parties as shown in this case could have made any difference as to the fact of where the true dividing line ran between their respective tracts of land."

Proof of an agreement settling a boundary should be "most clear and distinct, without the shadow of a doubt, and by testimony the most convincing and satisfactory." It is not easy to see why the court did not believe this condition complied with in Burris v. Fitch.[26] The division line was uncertain, "an indeterminate line." The findings were that improvements had been made up to the fence after its erection during a period of at least sixteen years and with the knowledge of plaintiffs; that defendants' property had been owned and occupied by five or six different persons since the construction of the fence; and that plaintiffs had not intimated to the successive owners (with two exceptions) that they claimed any part of the land within the fence. A judgment for the plaintiffs was reversed because of the acquiescence by plaintiffs for at least sixteen years, but, for the reason that the findings were of probative rather than of ultimate facts, a new trial was ordered.

In the case next in order, the lines of the Corralitos and Pajaro ranchos overlapped. The boundaries of the latter were uncertain and indefinite, and a surveyor would have to go by the "lay of the ground, and by fences, and possession of adjoining occupants, and by rejecting and changing and adding calls of deeds." A line was expressly agreed upon by the owners and a fence built, recognized and accepted as the partition fence. Here were all of the essentials to a valid express oral agreed division line.[27] The Supreme Court, in the second appeal of Helm v. Wilson,[28] approved of an instruction in substance

> "That the burden was upon the defendant to establish an agreed line by parol testimony, and that unless the line claimed

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[25] (1888), 76 Cal. 230, 233, 18 Pac. 386.
[26] (1888), 76 Cal. 395, 18 Pac. 864.
[27] Silvarer v. Hansen (1888), 77 Cal. 579, 584, 20 Pac. 136.
[28] (1891), 89 Cal. 593, 26 Pac. 1103.

> by defendant was distinctly agreed upon by the adjacent owners, the jury could not find in favor of the defendant upon the theory of an agreed line."

This was construed to mean that the agreement "must have been distinctly made; that is, the minds of the parties must have fully met," and not as connoting an express agreement. It should be noted that the jury did not believe that the agreement was proved, as its verdict was for the plaintiff, who relied upon an accurate survey of the land. The division fence had stood for six years.

Cavanaugh v. Jackson[29] involved a fence which had been expressly accepted and acquiesced in as a division line. The position of the true line was so uncertain that a dispute arose; whereupon a joint survey was made, and the fence erected along the line thus determined. Six years later the plaintiff sought to attack the accuracy of the former survey, but properly met with defeat. In its repetition of the rule of agreed boundaries, the court ignored the question of uncertainty, although that element was present in that particular case.

Thaxter v. Inglis[30] is additional authority for the rule, already laid down in Helm v. Wilson,[31] that an actual dispute as to the boundary is not a necessary quantity: "there was uncertainty as to the location of the boundary, and this was sufficient foundation" for the agreement. Although it is not said that uncertainty must be present, the inference of the opinion is that either uncertainty or dispute (which in itself implies uncertainty) is requisite to a valid agreement. This opinion marks another advance in the statement of the rule, which is finally fully developed in Dierssen v. Nelson,[32] and set forth in the following words:

> "When owners of contiguous parcels of land, the boundary line between which is *uncertain and unfixed* (our italics) by parol agreement, mutually establish a dividing line, and thereafter use and occupy their respective tracts according to such line for a considerable period of time, particularly when they so act for a period longer than the statutory period of limitations, and for such period maintain a fence on the line, such line cannot afterwards be controverted by the parties or their successors in interest."

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[29] (1891), 91 Cal. 580, 27 Pac. 93.
[30] (1898), 121 Cal. 593, 54 Pac. 86.
[31] (1888), 76 Cal. 476, 485, 18 Pac. 664.
[32] (1903), 138 Cal. 394, 71 Pac. 456.

After this decision we shall find no case which does not, at least in words, prescribe uncertainty as to the boundary as one of the conditions of the rule.

We need not notice Western Union Oil Company v. Newlove[33] further than to note that the practical location which was there upheld was made by express agreement in 1888, following a controversy about the boundary. In Lewis v. Ogram,[34] Mr. Justice Shaw, in applying the above rule to the facts of that case, said:

> "Such an agreement necessarily is not valid for any other purpose than that of settling an uncertainty in regard to the common boundary If adjoining owners agree on a division line, knowing that it is not the true line, and with the purpose of thereby transferring from one of them to the other a body of land which they know his true line does not embrace, the agreement will not be enforced. Such a transaction would not constitute an adjustment of uncertainties or doubts as to the true line, but would be an attempt to convey or release land from one to the other. Land cannot be conveyed by the device of moving fences or changing the marks or monuments which define its limits. If an agreement having for its real object the transfer of the land, but relating by its terms solely to the boundary line and made with knowledge that the true line is elsewhere than at the place fixed, is oral, it would be void, being an attempt to transfer land without writing. If it is in writing it would be ineffectual to pass title, for it would lack the apt words of conveyance that are necessary to accomplish a transfer of real property."

In the opinion of the court, there was no doubt or uncertainty as to the location of the true line. The agreement under discussion in that opinion, although in writing, was held to be void. Both parties knew that the agreed line had no relation to the true line, and did not select it with any real purpose to resolve any doubts as to the exact location of the line. Evidently, they had some ulterior motive, but at any rate they did not intend to contract with reference to a division line.

Under the doctrine of Lewis v. Ogram, that the agreement must be made "to settle a doubt about the division line, and in good faith to substitute an arbitrary line as the boundary," Mr. Justice Sloss, in writing the opinion of the court in bank, in Mann v. Mann[35] refused to recognize an express oral agreement which had

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[33] (1905), 145 Cal. 772, 79 Pac. 542.
[34] Supra, n. 4.
[35] (1907), 152 Cal. 23, 91 Pac. 994.

for its object not to ascertain the boundary, but to exchange small parcels carved from the adjoining tracts.

The uncertainty which justified the finding of a tacit oral agreement in Young v. Blakeman[36] resulted from some difference in the position of the east line of Grant Avenue in San Francisco, in 1863, when the defendant's lot was first measured, and later when the agreed line was established. It is inferable, from the language of the court, that there was a difference of at least four inches between measurements made at different times.

The principles discussed in Young v. Blakeman, were applied with brief comment in Dundas v. Lankershim School District.[37] Defendant's property was surveyed in 1888 or 1889 and its corners marked by stakes, the exact position of which was known when the controversy arose. In 1891 the property was conveyed to defendant by a deed obviously intended to describe the same land so surveyed and marked. A re-survey was made in 1905 for plaintiff's predecessor and the claim made that the first survey was erroneous. In sustaining the location actually marked upon the ground the court said that it must be accepted regardless of its accuracy as it may appear by subsequent measurements. The statement was correctly made with reference to the Dundas claim, but dangerously broad. The court had for consideration an original location based upon and conforming to a careful survey, and a later survey conflicting therewith. Which survey was the more accurate does not appear. The transcript shows that each party insisted that his survey was correctly made and introduced evidence to sustain the claim. The greatest effect that by any possibility could be given to plaintiff's contention was that there was uncertainty as to the true location of the line, and his own success in proving the uncertainty would tie him to the practical location.

An accurate statement of the rule was made by our Supreme Court in Loustalot v. McKeel:[38]

> "The rule universally sustained by the authorities is that where the boundary line between the lands of contiguous owners is doubtful or uncertain, and they by parol agreement fix and determine a dividing line between their respective tracts, the line being marked by the erection or maintenance

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[36] (1908), 153 Cal. 477, 484, 95 Pac. 888.
[37] (1909), 155 Cal. 692, 102 Pac. 925.
[38] (1910), 157 Cal. 634, 640, 108 Pac. 707.

> of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them."

In Loustalot v. McKeel the calls of the deeds were widely divergent. They overlapped each other to an extent of fifty-eight feet, and after an extended dispute a boundary was agreed upon by defendant and plaintiff's predecessor in interest. The opinion of the court proceeds further, and it is said that the owners deemed the matter of the location of the true line uncertain:

> "It may be that they were in error in this respect and that a careful examination of their respective titles by an attorney, and accurate surveys of their lots according to the calls of their several deeds, would have fixed an absolutely correct boundary line between them. But whatever might have been possible in this respect, the fact is that the true location of the line was considered uncertain and was definitely fixed between them, acquiesced in without question for years, and each occupied their lands thereafter according to the agreed line. When they entered into the agreement both had equal knowledge of the facts and no deception or fraud was practiced. Under these circumstances it is entirely immaterial whether the parties were right or wrong in believing that the true line was exactly where it should be as they established it. They were certainly in doubt as to where it should run, and adjusted the matter by making a practical location of the line where they thought it ought to be, and having acquiesced in it as so established, and having occupied their lands under the location for almost seven years, a longer period than prescribed by the statute of limitations to bar a right of entry—the line they established is conclusively determined to be the true division line."

The quoted portion of the Loustalot opinion is out of harmony with Janke v. McMahon,[39] infra.

We cannot determine from the record whether or not the express parol agreement involved in Campbell v. Grennan,[40] was correctly enforced. Both sides conceded that it would have bound the original parties; the only question which was discussed and decided concerned the status of plaintiff as an innocent purchaser without notice.

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[39] (1913), 21 Cal. App. 781, 788, 133 Pac. 21.
[40] (1910), 13 Cal. App. 481, 110 Pac. 156.

An express parol agreement was the subject of dispute in Price v. De Reyes,[41] The rule is quoted as stated in Young v. Blakeman;[42] the court then rejects the contention that the "rule does not apply when the location of the boundary is merely uncertain but that it must have been absolutely unascertainable:"

> "It is only where the true location is subsequently ascertained that actions of this kind arise. Consequently, the rule could not apply if the location was unascertainable. According to all the authorities, it is sufficient if the true location is uncertain and the parties fix the boundary because of its uncertainty and afterwards occupy up to it and make improvements thereon."

The boundary there before the court was marked by a fence and building, placed upon a line indicated to defendants at the time of the conveyance by their grantor, who was also the predecessor in interest of plaintiffs, marked at that time by iron stakes, then by the fence and building, and later confirmed by a survey made by plaintiffs themselves. When the dispute arose a new survey was made, which, as in Dundas v. Lankershim School District,[43] seemed to show that the former measurement was inaccurate. There was uncertainty as to the correct location, on the ground, of the corner of a certain block shown on a map recorded in 1888 and the intersection of two streets as established by proceedings had in 1896.

Mr. Justice Henshaw, in Clapp v. Churchill,[44] declared that

> "the doctrine of an agreed boundary line and its binding, effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line."

In that case there was no contention that there were any false calls in the deed to plaintiffs, or any discrepancy between the calls and visible and declared monuments. There was no question or doubt or dispute between the parties over the boundary. Plaintiff did not know where the boundary line was until, by a survey, it was easily determined, and in fact the boundary stakes were uncovered.

We venture to make this comment upon one clause used by the court and found in the sentence quoted: something more than

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[41] (1911), 161 Cal. 484, 119 Pac. 893.
[42] Supra, n. 36.
[43] Supra, n. 37.
[44] (1913), 164 Cal. 741, 745, 130 Pac. 1061.

the belief of all parties that an uncertainty exists should be required. Like the facts of Johnson v. Brown,[45] such expressions direct attention to the need of a definition of the word "uncertainty" as used in this connection.

As early as 1863, in a case involving a dispute between the owners of adjoining mines,[46] it was held that the defendants "had the means of ascertaining, by means of a survey, the exact location of the line in the tunnel, and they were guilty of negligence in not informing themselves of this fact under the circumstances of that case." Janke v. McMahon[47] and Hartung v. Witte,[48] quoted therein, announce the definition which should be, though it is not, uniformly insisted upon. The California court says that the owner

> "must be presumed to have been familiar with the terms of the instrument that constituted his muniment of title. If he did not actually know the extent of his property he had the means of knowledge within reach."

This declaration is completed by the statement of the Wisconsin court that

> "the boundary is considered definite and certain when by survey it can be made certain from the deed."

In February, 1913, the Court of Appeal of the Second District rendered its opinion in Honaker v. Heatly.[49] The correct corners and lines evidently could be located without difficulty from government surveys, although an erroneous mark had been set by a private company, not a party to the action. The adjoining owners erroneously believed that the private survey correctly marked the boundary, and the defendant, with plaintiff's acquiescence, occupied and improved up to the line. These facts were pleaded by the defendant, but the trial court refused to make findings thereon. The Court of Appeal affirmed the judgment upon the ground that the facts so pleaded were insufficient to constitute an equitable defense. There was no dispute as to the true location of the line, and no agreement in words as to its location. Under such circumstances an agreement to fix the boundary would not be implied.

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[45] Supra, n. 18.
[46] Maye v. Yappen (1863), 23 Cal. 306, 309.
[47] (1913), 21 Cal. App. 781, 788, 133 Pac. 21.
[48] (1884), 59 Wis. 285, 18 N. W. 175.
[49] (1913), 21 Cal. App. 327, 131 Pac. 759.

Schwab v. Donovan[50] was decided one month later than Honaker v. Heatly. The true dividing line should have been run due east and west, according to government surveys. A different line was established by a fence at least as far back as 1888, and the fence was rebuilt on occasions and kept in repair at the joint expense of both owners. Apparently the error was discovered the first time any attempt was made to survey the line, two and a half years before the trial, and there seems to have been no real uncertainty as to where the line should have been, and no difficulty in locating it by a survey. Yet the Supreme Court affirmed a finding that the boundary had become fixed by agreement. The court seems to have been satisfied with the fact that the parties were uncertain, even though the line itself was certain, and, unlike Mr. Justice Henshaw, the author of the opinion in Clapp v. Churchill,[51] implied an agreement resting upon mere ignorance of the true line.

Schwab v. Donovan and Honaker v. Heatly were decided almost simultaneously by different courts, so neither court had before it the decision in the other case. It is unfortunate that the attention of the Supreme Court was not directed to Hartung v. Witte,[52] and the argument insisted upon that the "means of knowledge" were within reach.

The difficulty of applying abstract rules to concrete facts is demonstrated by the two opinions in Grants Pass Land and Water Company v. Brown, one by the Court of Appeal of the Second District,[53] the other on rehearing before the Supreme Court in bank.[54] The former court sustained defendant's claim on the triple ground that a boundary had been established by agreement; that title had been acquired by adverse possession; and that the plaintiff was estopped from disputing the defendant's claim on the facts shown. The latter court ruled that the defenses of agreed boundary and adverse possession had not been made out. Only a part of the boundary had been fixed by agreement, and the Supreme Court refused to extend the agreement "by construction or implication, so as to embrace a part of the bounds which were not considered or included in the agreement and as to which there was no agreement."

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[50] (1913), 165 Cal. 360, 132 Pac. 447.
[51] Supra, n. 44.
[52] Supra, n. 48.
[53] (1914), 18 Cal. App. Dec. 135.
[54] 168 Cal. 456, 143 Pac. 754.

Mr. Justice Shaw, in Wheatley v. Salt Lake Railway Company,[55] said that

> "there must be an agreement in order that a division line shall become fixed; this agreement must be express or implied from the acts of the parties and acquiesced in for the period fixed by the statute of limitations."

If we are to stand upon the strict logic of our theory, there would seem to be no reason for requiring an express agreement to be acquiesced in for any fixed period. If the agreement be made it should be binding when made. It is submitted that acquiescence is important only where the agreement is tacit, and then only as an evidentiary fact tending to prove the existence of the agreement.

As a conclusion from the foregoing discussion, we may suggest that the rule of boundary lines by agreement should be substantially in this form, although the Supreme Court has not always been so strict in using the expression "uncertainty" as the rule would require:

> "When the owners of adjoining estates, being uncertain of the true position of their boundary, and being unable to determine its position with certainty by a survey based upon the calls of their deeds, agree in writing or by parol, expressly or tacitly, upon the location of the line, such line becomes in law, the true line called for by the respective descriptions. The line thus defined will attach itself to and control the deeds."

Since the essence of our theory is that boundary lines of this character are established by contract, by a meeting of minds, evidenced either by express words or by a course of conduct, we are prepared for the corollary that when the elements of mistake are present there can be no meeting of minds and no boundary by agreement, even after the lapse of many years.

At first the rule was otherwise. In Sneed v. Osborn,[56] and again in Biggins v. Champlin,[57] which latter case we already have criticised as out of harmony with the rule that uncertainty is essential to a valid parol agreement fixing a division line, the court declared that "it makes no difference that the parties, in making the location, acted under a mistake as to the true line." In the Sneed case the declaration was unimportant, as the location of the boundary actually was uncertain.

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[55] (Mar. 4, 1915), 169 Cal. 505, 512, 147 Pac. 135.
[56] Supra, n. 8.
[57] Supra, n. 15.

In Smith v. Robarts,[58] in which case the fence had been built under the mistaken belief, held by both owners, that it coincided with the true line, the Supreme Court said:

> "A possession of land held under a mutual mistake has no effect upon legal rights; it is not adverse or conclusive against the assertion of any existing rights upon the true title."

Although both Sneed v. Osborn and Biggins v. Champlin were referred to and explained in the opinion upon the point of acquiescence, their declaration that mistake makes no difference was disregarded.

It is said obiter, in Dierssen v. Nelson,[59] that the building of a fence does not conclude the parties as to the boundary line where it has been built as "the result of a clear mistake." Finally, in Honaker v. Heatly,[60] decided in 1913, the Court of Appeal followed the logical rule, saying, with reference to the facts in that case:

> "No agreement in words as to the location of the line was made, and it is clear that any acts or conduct of the parties from which an agreement might be inferred were due to a mutual mistake of fact. Under such circumstances plaintiff was not precluded or estopped from claiming his estate in accordance with the true line when the same was ascertained."

The Supreme Court of the United States[61] is then quoted to the effect that

> "The decisions in the other states generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered."

II. Lines Established by Estoppel.

Even in the absence of a valid agreement a boundary line may be established by estoppel. Helm v. Wilson,[62] involved a case where

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[58] Supra, n. 22.

[59] (1903), 138 Cal. 394, 398, 71 Pac. 456.

[60] Supra, n. 49.

[61] Schraeder Mining Co. v. Packer (1889), 129 U. S. 688, 32 L. Ed. 760, 9 Sup. Ct. Rep. 385.

[62] (1888), 76 Cal. 476, 18 Pac. 604.

a two story frame house had been built to the line. In the first appeal of that case it was said:

> "It has been held that, even without any agreement more than is implied from their acts, if two persons trace their dividing line, and, both recognizing it as such, one goes forward with the knowledge and acquiescence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterward alleging such mistake as shall deprive the builder of his improvements, and especially if the party seeking to disturb the line knew, at the time the improvements were made, all that he subsequently learned, or if he had the means of knowledge."

Ordinarily, under the authority of cases already discussed herein[63] "the means of knowledge" will be the title deed, when there is no inaccuracy or ambiguity in its calls.

In many of the briefs of counsel and opinions of the courts referred to in this article there is a confused use of the term "estoppel," which should be noted in our effort to clarify the theory of the law of boundaries and to suggest a proper classification. Thus, the opinion in Johnson v. Brown[64] cites certain earlier California cases[65] as holding that when adjacent owners have recognized a division line for more than five years, "either is estopped from afterwards questioning it as the true line." In fact, those cases were examples of contracts, not of estoppel.

Bearing in mind that the operation of the principles of estoppel is to forbid one from asserting as true that which is true, it is obvious that the decisions thus quoted are not authority for the rule, and in fact throw absolutely no light upon any question of estoppel. For it is an essential part of their doctrine, as we have restated it, that the agreed line "attaches itself to the deeds" and becomes the true line called for by the respective descriptions. That is not equivalent to prohibiting either owner from claiming to the true line.

Furthermore, how could the doctrine of estoppel be invoked against any of the owners whose property lines were litigated in those cases? There being uncertainty as to the true locations of their lines, there was no concealment of knowledge by them, no

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[63] Janke v. McMahon, supra, n. 47; Hartung v. Witte, supra, n. 48.
[64] Supra, n. 18.
[65] Sneed v. Osborn, supra, n. 8; Columbet v. Pacheco, supra, n. 13; Biggins v. Champlin, supra, n. 15; Cooper v. Vierra, supra, n. 16.

silence when they should have spoken, and no neglect or inequitable conduct upon which an estoppel could be founded.

Again, even as late as April, 1913, Mr. Justice Burnett wrote:[66]

> "Nor is plaintiff estopped from questioning the boundary line by reason of any agreement or acquiescence as to its location."

The sentence involves a confusion of ideas which should be distinct and separate. When there is agreement, the parties adopt a given line as the true line. The agreement can exist only when the true location of the line is uncertain. There is no occasion to term this an estoppel.

The true distinction between the two classes of cases we believe is this; that when the true line is certain, it cannot be changed by agreement (except, of course, an agreement in writing containing apt words of conveyance), but through estoppel one owner may be forbidden to claim to the true line.[67]

Johnson v. Brown[68] was an example of true estoppel. The defendant purchased a strip of land twenty-five feet wide from the plaintiff, and measured off his property with a pole and tape line. In this rough way he included twenty-six instead of twenty-five feet of land. Both parties acquiesced in the measurement as correct (an instance of mistake) and "it was then agreed between them that if the defendant would build his house close up to the supposed division line, the plaintiff would build a fence along the line from the house to the rear line of the lots." The building of the house was such a change of position on the part of the defendant that the plaintiff properly should have been estopped from insisting upon an accurate survey and the destruction of a part at least of the improvement.

The following instruction was given by the trial court in Hughes v. Wheeler:[69]

> "If you believe from the evidence that plaintiff, before this action was brought, by unequivocal acts and declarations, showed an intention to act upon the line claimed by defendant as the dividing line between the lands, and silently stood by and saw defendant expend money in improving his land, such acts upon the part of plaintiff estop him from claiming that defendant does not own the land upon which he has expended money and made his improvements. Where

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[66] Janke v. McMahon, supra, n. 47.
[67] Sneed v. Osborn (1864), 25 Cal. 619, 630, 30 Pac. 433.
[68] Supra, n. 18.
[69] (1888), 76 Cal. 230, 18 Pac. 386.

> a proprietor points out to a neighbor, on land adjoining his own, a line as the true boundary, acquiescing and assisting in a settlement and improvements thereon, he is thereby estopped from afterwards asserting claim to the lands covered by the improvements, though a subsequent survey prove it to be his own land. In a dispute between adjoining proprietors of land, it may be settled between them by a location made by both, or made by one and acquiesced in by the other for so long a time as to be evidence of an agreement as to the line."

That part of the instruction which related to estoppel was approved by the Supreme Court. The last sentence, it will be noted, does not relate to estoppel, but to agreement and acquiescence as evidence of agreement.

An adjoining owner who induced a prospective purchaser of his neighbor's property to waive his determination to have a survey made was held, both by the Supreme Court and by the Court of Appeal, to have estopped himself from denying that the boundary was that marked by the fences which he himself had described as being on the true line.[70]

Upon principle, it would seem that subsequent purchasers of land should stand in no better position as to an estoppel than their predecessors in interest, when the facts which are made the basis of the claim of estoppel arose before such purchasers became the owners of the land. Assume that A and B own adjoining properties. The common boundary is certain and susceptible of exact location on the ground. Nevertheless, structures are erected by A which overlap the boundary and stand partly on B's land. This is done without any agreement to change the boundary, and in the absence of any element of estoppel. As between A and B, the boundary remains unchanged, as set by the calls of their deeds. At any time during his ownership B can insist upon the removal of the structures. Thereafter, A sells to C, who makes his purchase without communicating with B. In the problem as thus stated all question of estoppel is eliminated, unless C can assert that he fixed his price and made his purchase in reliance upon the visible line of possession, and that B, because of his part in permitting the structures to stand where they were first built, has contributed to the deception of C and is estopped from claiming to the true line. We submit that C is not a bona fide purchaser without notice. The

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[70] Grants Pass Co. v. Brown, supra, n. 53, n. 54.

very deed by which he acquires title gives him notice of a discrepancy between the boundary and the line of use, and in taking the property without causing a careful measurement to be made he is as negligent as were A and B in making their improvements. Equity, therefore, should not aid him by recognizing an estoppel in his favor.

One who acquires property should not be permitted to ignore the calls of his deed, and to found any right, to the detriment of others, upon his reliance upon what, at best, is mere impression, derived from the position of a board fence, or a row of trees, or a pile of stones. Yet a very early California case,[71] would seem to be authority for a different rule. There the members of several companies, the owners of adjoining mining claims, went upon the ground, and by mutual consent set a stake at a point B to mark the line between the Michigan and the Star Point claims. After two years the Michigan company, from actual survey, found that the line was located upon its property, and not at the true boundary thereof, and that its tunnel by mistake crossed the agreed line. It does not appear that the Star Point Company had made improvements to the line. In the meantime, both companies changed hands, so that the controversy, on both sides, arose between subsequent purchasers, all of whom had purchased with a view to the located line. Upon the ground that bona fide purchasers were involved, the court said that the Michigan company was estopped from disputing the compromise line as against the plaintiff. It is possible that the result reached by the court was correct; that the boundary had been fixed by agreement. If there was any real uncertainty as to the proper dividing line the compromise line had become the true line. In that event there was no need to invoke an estoppel, and the decision is correct, though the reasoning of the court is bad. But if there was no such uncertainty, and no valid reason for disregarding the known, definite, division line, the subsequent purchasers should have been held charged with notice of the true location.

Neither can subsequent purchasers safely disregard the line of actual possession and assume without question that they will acquire to the line which is described in their deeds. They must make inquiry into any "patent and obtrusive circumstances," such

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[71] McGee v. Stone (1858), 9 Cal. 600.

as the projection of a house over the record boundary, which might be "calculated to excite the suspicion of any prudent man that some agreement not disclosed by the record was made by the parties owning the lot."[72]

III. Lines Established Through the Acquisition of Title by Adverse Possession.

Before May, 1878, whenever an uncertain boundary had become fixed by agreement and had been acquiesced in for five years, it could be defended upon the theory that the title to the land had been acquired by adverse possession, as well as upon the doctrine of agreed boundaries, or of estoppel. In strict logic the theories of agreement and of adverse possession are not consistent. Under one view there had been no transfer of title; a particular line on the ground has attached itself to a deed. Under the other, title has been acquired by prescription. Nevertheless, the court in many instances[73] has upheld boundaries established by occupation upon both of these grounds.

A case curiously illustrative of this distinction is Allen v. Reed.[74] The plaintiff acquired title to lot 2 by a tax deed. The defendant and his grantors had owned the adjoining lot for sixteen years, during which time they had the continuous adverse possession of a strip of land cut off of lot 2 by their fence. The sale to the plaintiff was made within five years next before the commencement of the action, so that the full prescriptive period had not run against the plaintiff. Had the litigation arisen between Allen's predecessor in interest and the defendant, it is probable the court would have held that Reed had acquired the title to a part of lot 2 by adverse possession. As it was, however, the question of title was not involved. Lot 2, whoever owned it, had been sold for taxes. The tax deed conveyed to the grantee the title to lot 2, and the only problem was to ascertain the boundary of that lot. Adverse possession could not destroy the identity of the lot, or in any manner change its boundaries, for which reason the plaintiff was held to be the owner of all of lot 2 according to the official survey of the city.

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[72] Campbell v. Grennan, supra, n. 40.

[73] Johnson v. Brown, supra, n. 18; Silvarer v. Hansen, supra, n. 27.

[74] (1876), 51 Cal. 362.

It seems that even if the adverse claim was made under a mistaken belief that the line of possession coincided with the true line title may be acquired and the boundary thereby fixed by prescription. "Most cases of adverse possession which have ripened into title commenced . . . in mistake. It must be either by mistake or deliberate wrong. It is through mistake only that one can honestly claim to own that which really belongs to another."[75]

Adverse possession, however, can sustain a practical location only in those instances in which the prescriptive title has ripened prior to May 31, 1878. On that date an amendment to section 325 of the Code of Civil Procedure became effective, requiring that the payment of all taxes levied and assessed upon the land claimed during a five year period be shown in such actions.[76]

In Lucas v. Provines,[77] there was involved the ownership of a strip of land in San Francisco. Defendant, in 1863, acquired the westerly ten feet of lot 817. There was no mark of division between the ten foot strip and the remaining easterly part of the lot. Defendant took possession of more land than she was entitled to, and thereafter claimed and occupied it as her own. In 1891 the plaintiff acquired paper title to the strip in controversy, but had never been in possession. Here the court said:

> "As this possession of the defendant commenced in 1863, and has been continuous since that date, her title to the land by adverse possession was complete prior to 1878, and the amendment to section 325 of the Code of Civil Procedure, making the payment of taxes an element of adverse possession, has no application."

Because of this necessity and except when possessory title was perfected prior to 1878, the theory of prescription in boundary cases has become entirely secondary to and dependent upon the rule of agreed boundaries. Assessors usually adopt the descriptions under which owners acquire and hold land. If the descriptions are certain and definite the assessments may be said to follow the deeds. Each owner then pays taxes according to his deeds, and even though one is occupying a part of the other's property, he is not fulfilling "the

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[75] Woodward v. Faris (1895), 109 Cal. 12, 17, 41 Pac. 781; Lucas v. Provines (1900), 130 Cal. 270, 62 Pac. 509.

[76] Johnson v. Brown, supra, n. 18; McDonald v. Drew (1893), 97 Cal. 266, 269, 32 Pac. 173; Woodward v. Faris, supra, n. 75; Eberhardt v. Coyne (1896), 114 Cal. 283, 46 Pac. 84; Dierssen v. Nelson, supra n. 32; Lucas v. Provines, supra, n. 75.

[77] (1900), 130 Cal. 270, 62 Pac. 509.

statutory requisite to the acquisition of a title by adverse possession."[78] Therefore, such an owner must first prove that the location of the true line is uncertain before he can claim to have paid taxes upon the disputed strip.

This is shown clearly by Eberhardt v. Coyne.[79] If he succeed, he has demonstrated the existence of an agreed boundary line, and adds no strength to his case by proceeding further to prove that he obtained title by adverse possession. Justice McFarland, dissenting in the Eberhardt case, refers to testimony of a surveyor that it was "impracticable to determine with any accuracy where the true line between the two lots was." If in fact the location of the line was so clouded with doubt, it is not easy to understand why the case was not presented and decided upon the theory of an agreed boundary. The principle does not seem to have been referred to, even in the dissenting opinion.

In sustaining Nelson's claim in Dierssen v. Nelson,[80] upon the additional ground that he had "a plain, clear, title by prescription," Justice McFarland said that the description of the boundary, as the land was assessed, must be taken to mean "the line established as hereinbefore stated."

Price v. De Reyes[81] also illustrates the point. The controversy was decided for the defendants upon the ground that the line was fixed by agreement, before the court came to a discussion of adverse possession, saying,

> "As we have seen, a division line thus established attaches itself to the deeds of the respective parties. The consequence is that *under such circumstances* the payment of taxes assessed in this manner is a payment on the land in the possession of the parties."

And in Grants Pass Company v. Brown[82] the Supreme Court definitely said, after describing the manner in which the land in controversy was assessed,

> "It will be seen, therefore, that the claim of adverse possession must fall, unless there was a line established by agreement, possession and acquiescence, as alleged."

When title by adverse possession is sustained, the land must have been occupied up to the boundary under an adverse claim of

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[78] Mann v. Mann, supra, n. 5.
[79] (1896), 114 Cal. 283, 46 Pac. 84.
[80] (1903), 138 Cal. 394, 71 Pac. 456.
[81] Supra, n. 41.
[82] Supra, n. 54.

ownership. It is not established when fences or other structures or marks are placed with an understanding that they will be moved when the true lines are found. This is in entire accord with the general doctrines of adverse possession.[83]

Coterminous boundaries, we therefore submit, may be established by express or tacit agreements. When the agreements, whether express or tacit, rest in parol, it is essential to their validity that the location of the boundaries on the ground, as called for by deeds, be uncertain. The mere fact that fences or other structures have been built up to the line and maintained even for a period exceeding five years is not in itself sufficient to establish a line of occupation as a boundary line. This is particularly true when such structures have been built with the understanding that they are not on the true line, and that they should be moved when the true line is located. Lines also may become established by estoppel, even though uncertainty be absent so that an attempt to fix the boundary by parol agreement would fail. Lastly, in cases which still arise from time to time, where prescriptive title was perfected prior to May 31, 1878, courts will not disturb established boundaries.

In practice, the lawyer should apply each of these formulae to a given problem before resolving a boundary dispute in favor either of a practical location or of a survey based upon the calls of a deed.

Joseph P. Loeb.

Los Angeles, California.

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[83] Irvine v. Adler, supra, n. 11; Quinn v. Windmiller, supra, n. 21; Smith v. Robarts, supra, n. 22; Janke v. McMahon, supra, n. 47.